Supreme Court, U.S.
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No. 89-961

In The

Supreme Court of the United States

October Term, 1989

EDWARD LaMON AND LORRAINE LaMON,

Petitioners,

vs.

CITY OF WESTPORT, A MUNICIPAL CORPORATION; BILL WADE, JR., AND JANE DOE WADE, HIS WIFE; ORVILLE ENGLE AND JANE DOE ENGLE, HIS WIFE; FRANK SCHNIDER AND JANE DOE SCHNIDER, HIS WIFE; GARY PEDERSON AND JANE DOE PEDERSON, HIS WIFE; CHERYL AHERN AND JOHN DOE AHERN, HER HUSBAND; GLEYN BLEDSOE AND JANE DOE BLEDSOE, HIS WIFE; AND JOHN J. REGAN AND MABLE REGAN, HIS WIFE;

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. JURISDICTION

The Supreme Court lacks jurisdiction in this action. Petitioners failed to plead their present contentions before any Washington state tribunal, and the underlying opinion for review, *LaMon v. Westport*, 44 Wash. App. 664, 723 P.2d 470 (1986), dealt with and was decided exclusively on state law. Thus, there is no "federal question" jurisdiction and certiorari is inappropriate. 28 U.S.C. § 1257 (1982 & Supp. III 1989).

II. STATEMENT OF THE CASE

On July 3, 1980, petitioners brought the present action for defamation and invasion of privacy against the City of Westport, the members of the Westport city council, and the Westport police chief, John Regan. The suit was filed in state court and alleges only state law causes of action. The action is based on respondents placing allegedly defamatory material in the Westport public library. The material related to an earlier federal district court lawsuit involving petitioners and the police chief Regan.

In the earlier suit, petitioners claimed that Regan denied them equal protection and that he falsely arrested and maliciously prosecuted them. The suit was brought during a lapse in the city's insurance, and because the suit was brought against Regan in his official capacity, the city decided to finance Chief Regan's legal fees. Following a 1978 federal judgment against Regan on the equal protection claim, the Westport city council continued to finance Regan's attorney's fees on appeal and agreed to

post an appeal bond. In addition, the city council decided to place in the public library a large file of materials from the federal litigation so that interested citizens could see for themselves the justification for the expenditure of municipal funds. The council contacted petitioners so that they could include documents of their choice in the file. Petitioners, however, declined.

The file placed in the public library totaled 505 pages and included: appellate briefs; trial memoranda and briefs; court orders; findings and conclusions of the federal district court; various correspondence; trial transcripts; interrogatories and answers to interrogatories; and police investigation reports introduced into evidence at trial. The file was kept on a shelf under the checkout desk and was accessible to the public only through the librarian or her staff. Throughout the proceedings before the trial court in this case, petitioners were unable to specifically identify any person who requested and actually reviewed the contents of the file in the Westport library.

Petitioners brought this state court suit in July, 1980. At the trial level, respondents moved for summary judgment, contending that as a matter of law there was no evidence regarding publication. The motion was denied. Respondents filed a second motion for summary judgment on the basis that the designated file materials would not, as a matter of law, support an action for defamation or invasion of privacy. The trial court granted the second motion and dismissed the case with prejudice.

Petitioners appealed to the Washington Court of Appeals. The court, in a July 31, 1986 opinion, affirmed

the dismissal of the suit, finding that the lack of publication defeated petitioners' claims. Petitioners then petitioned for review of the decision to the Supreme Court for the State of Washington. Review was denied by that Court on June 6, 1989.

III. OPPOSITION TO CERTIORARI

A. LACK OF FEDERAL QUESTION JURISDICTION.

1. Introduction.

Supreme Court review by way of writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. RSCUS 17. Petitioners have argued that certiorari, based upon alleged violations of the Fourteenth and Seventh Amendments of the Constitution and their constitutionally protected right of privacy, is proper in this case. As a prerequisite for review, the court must have "federal question" jurisdiction over the state action. The highest court in the State of Washington must have decided a federal question in a way that conflicted with the decision of another state or federal court or the Constitution, questioned the validity of a statute of the state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or reviewed a right or privilege specially set up or claimed under the Constitution, treaties or statutes of the United States. RSCUS 17.1(a)(b), 28 U.S.C. § 1257. Such grounds for jurisdiction are nonexistent in petitioners' Petition for Writ of Certiorari. No federal question was ever brought before or decided by a Washington state tribunal. Certiorari is thus

inappropriate in this instance. *See Webb v. Webb*, 451 U.S. 493, 495-97, 101 S. Ct. 1889, 1891-94, 68 L. Ed. 2d 392, 395-97 (1981); 28 U.S.C. § 1257.

2. Failure To Plead Federal Issues Before A State Court.

Supreme Court review over final state court decisions may be had only when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims. . . ." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13, 103 S. Ct. 2841, 2848, 77 L. Ed. 2d 420, 433 (1983). Jurisdiction of the Supreme Court to reexamine the final judgment of a state court can only arise if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb*, 451 U.S. at 496-97, 101 S. Ct. at 1891-92, 68 L. Ed. 2d at 396-97. The federal question must have been raised in a proper and timely manner in the state courts. *Id.* 451 U.S. at 501, 101 S. Ct. at 1894, 68 L. Ed. 2d at 399-400; *see Street v. New York*, 394 U.S. 576, 581-85, 89 S. Ct. 1354, 1360-62, 22 L. Ed. 2d 572, 579-80 (1969); *Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S. Ct. 61, 63, 73 L. Ed. 184, 187 (1928). Failure to do so precludes Supreme Court review of the issue. *Street*, 394 U.S. at 582, 89 S. Ct. at 1360, 22 L. Ed. 2d at 579.

Petitioners listed the following issues for review on certiorari:

> I. Does the Fourteenth Amendment to the United States Constitution provide procedural and/or substantive due process protection for a person's "good name and

reputation" from the intentional dissemination of false and private information by the placing of such information in the City Library by the municipal corporation?

II. Does the Fourteenth Amendment to the United States Constitution protect a litigant in State Court on both the trial and appellate level from arbitrary adjudicative procedures?

III. Was petitioner [sic] deprived of a constitutionally protected right of privacy when the City of Westport placed defamatory and private material concerning them in the Westport City Library?

Petitioners never pleaded these federal arguments before any state tribunal. In their Rule 21.1(h) Statement specifying the stage of proceedings in the state court in which the "federal questions sought to be reviewed were raised," RSCUS 21.1(h), petitioners noted: "[t]he Seventh Amendment right to a jury trial was raised in petitioners' Petition for Review to the Washington State Supreme Court. Appendix F, App. 89-95." Contrary to petitioners' assertions, no Seventh Amendment right to a jury trial was ever inferred or raised in that proceeding. A review of petitioners' Appendix F reveals no reference or statement to the Seventh Amendment or any violation of petitioners' constitutional right to a jury trial. Indeed, petitioners' only inference to such a right was a single sentence referring to the Washington State Constitution: "[f]aith in the people is essential to democracy. That is why our state constitution provides that the right of trial by jury shall remain inviolate. *WN. State Const. Art. 1 § 21.*"

Petitioners failed to bring their presently alleged Seventh Amendment claims before the state forum and thus are precluded from bringing similar arguments before the United States Supreme Court. *Webb*, 451 U.S. at 501, 502, 101 S. Ct. at 1894, 68 L. Ed. 2d at 400.

Petitioners' Fourteenth Amendment claims are similarly defective. Turning again to their Rule 21.1(h) statement, petitioners represent that "[t]he Fourteenth Amendment due process clause was raised in the Motion to Reconsider to the Court of Appeals. Appendix G, App. 96-99. It was also raised in the Petition for Review to the Washington State Supreme Court. Appendix F, App. 89-95 inclusive." In their Motion to Reconsider in the Washington Court of Appeals, petitioners' Appendix G, petitioners stated the following:

> This court in its appeal applied the usual rules of summary judgment. It assumed for the purpose of appeal that the LaMONS met their burden regarding a defamatory and false statement, found that the publication was unprivileged, but ruled against the LaMONS on an issue which was not rightfully before the court, to wit, publication.
>
> At oral argument, the attorney for the appellant pointed out to the court that there had not been a cross appeal by the defendant's in this action, and that he did not feel that publication was an issue before the court. The attorney at that time indicated to the court that if they thought there was an issue on publication before the court that the records should be supplemented regarding this, and asked for the opportunity to address it in a supplemental brief.

* * *

> In this case the court did not have all the matters before it regarding publication when it ruled regarding this issue in its opinion. This is unfair not only to the trial court, but to the appellants.

Beyond arguing "unfairness," petitioners never asserted nor inferred a Fourteenth Amendment denial of due process. Petitioners' arguments centered on the issue of whether the court should have considered the publication issue. Similarly, in their Petition for Review to the Washington State Supreme Court, petitioners debated whether the appellate court should have considered publication in its decision and whether a party, in answering a motion for summary judgment, has a right to rely on the specific issues raised in the motion. Again, no Fourteenth Amendment right to due process was ever asserted. Because petitioners neglected to bring their present arguments before any state forum, certiorari should not be granted. *Webb*, 493 U.S. at 501, 502, 101 S. Ct. at 1894, 68 L. Ed. 2d at 400.

3. The Underlying Appeal Was Decided Under State Law.

Notwithstanding petitioners' failure to plead their federal contentions in the state court system, certiorari would nevertheless be inappropriate since the opinion in *LaMon v. Westport*, 44 Wash. App. 664, 723 P.2d 470 (1986)[1]

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[1] Since the Washington State Supreme Court denied review of the underlying action, the Washington Court of Appeals' decision stands as the substantive basis for petitioners' claims for certiorari review.

did not present grounds upon which federal question jurisdiction would arise. The case dealt with state issues and was decided on state law.[2]

The court in *LaMon* primarily discussed the necessity of publication as an element of defamation in the State of Washington, whether publication existed, and whether lack of publication was dispositive of not only defamation claims, but also invasion of privacy claims. Relying exclusively on state grounds, the court found that, "[t]he circumstances here do not support the inference that a publication occurred," and dismissed petitioners' defamation claims. *LaMon*, 723 P.2d at 473. In like fashion the court denied petitioners' claims for invasion of privacy, holding that "false light publicity requires *publicity* of the falsehood. . . ." *Id.* at 474. Petitioners' invasion of privacy claims based on the unreasonable intrusion upon their private affairs were disposed of with the statement that "[t]he LaMons have not explained what private affairs were intruded upon . . . much of the material in the file is a matter of public record . . . " *Id.*

State courts speak with final authority on questions of state law. *E.g., Mullaney v. Wilbur*, 421 U.S. 684, 691, 95

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[2] The only reference to federal law in the entire *LaMon* opinion was a footnote discussing the rules used with summary judgment. FRCP 56 and Washington's CR 56 are substantially similar. The reference was provided as guidance and had no bearing on the court's final determination. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201, 1214 (1983). A mere reference to federal law in a state cause of action does not automatically confer federal question jurisdiction. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813, 106 S. Ct. 3229, 3234, 92 L. Ed. 2d 650, 661 (1986).

S. Ct. 1881, 1886, 44 L. Ed. 2d 508, 515 (1975). The court in *LaMon* relied exclusively on Washington law to resolve the issues presented by petitioners at the state level. There is no Supreme Court review of a state decision that relies on adequate and exclusive state grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-42, 103 S. Ct. 3469, 3476-77, 77 L. Ed. 2d 1201, 1214-15 (1983); *Webb*, 451 U.S. at 500, 501, 101 S. Ct. at 1894, 68 L. Ed. 2d at 399. Since a federal question was neither raised by petitioners nor discussed in the state forum, Supreme Court review by way of writ of certiorari is thus improper. *Id.*, 451 U.S. at 501, 502, 101 S. Ct. at 1894, 68 L. Ed. 2d at 400.

B. No Constitutional Right Was Infringed.

No constitutional right was infringed on appeal in this case. Petitioners allege, in unclear terms, that certiorari is proper based upon the Washington Court of Appeals' "unfair" treatment of their case. Petitioners hold that since there was "no cross-appeal by the defendants," the issue of publication was not "before the court" and thus it was "unfair" for the court to affirm on that issue. (Petition at 8). No authority is cited by petitioners for the proposition that a cross-appeal was necessary to review the publication issue.

No such authority exists. It is a fundamental axiom of appellate review that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 90 S. Ct. 1153, 1156, 25 L. Ed. 2d 491, 496 (1970) (citations omitted). Furthermore,

cross-appeal by the prevailing party is not necessary for appellate court review. As noted in *Dandridge*:

> [I]t is likewise well settled that the appellee may *without taking a cross-appeal*, urge in support of the decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon the matters overlooked or ignored by it.

Id. (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36, 44 S. Ct. 560, 564, 68 L. Ed. 2d 1087, 1093 (1924)) (emphasis added); *see also Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S. Ct. 307, 308-309, 1 L. Ed. 2d 314, 315 (1957).

Appellate review is not restricted by the trial court's reasoning. "Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its actions." *J.E. Riley Inv. Co. v. Commissioner*, 311 U.S. 55, 59, 61 S. Ct. 95, 97, 85 L. Ed. 36, 40 (1940). *See Burns v. Miller*, 107 Wash. 2d 778, 780, 733 P.2d 522, 524 (1987) (trial court can be affirmed on any proper basis within the pleadings and the proof); *Haberman v. Elledge*, 42 Wash. App. 744, 748, 713 P.2d 746, 748 (1986) (correct judgment will not be reversed on appeal where it can be sustained on any theory, even on a theory not relied on by the trial court).

In the present case, respondents moved for summary judgment at the trial level on two separate grounds: lack of publication and lack of a defamatory statement. The court rejected the one ground, but granted summary judgment on the other, dismissing the entire action with prejudice. On appeal, the Washington Court of Appeals

applied the above stated axioms and reviewed both issues, as was proper. No cross-appeal by respondent was necessary. Finding the lower court decision to be correct, the court upheld the decision on one of the grounds urged below.

The court of appeals' decision to sustain the summary judgment on the lack of publication did not deny petitioners their due process rights. The entire appeal was conducted within the bounds of law and procedure. No unfairness existed in the appellate proceedings. Petitioners' ignorance of appellate practice and procedure does not constitute a violation of due process. Petitioners' constitutional rights were not infringed and thus no grounds exist for this court's review by way of certiorari.

IV. CONCLUSION

Certiorari review is inappropriate in this case. Petitioners not only failed to bring the issues pleaded in their Petition for Writ of Certiorari before the Washington court system, but the underlying opinion for review, *LaMon v. Westport*, 44 Wash. App. 664, 723 P.2d 470 (1986), addressed state law issues and was decided on state grounds. Their presently asserted constitutional claims substantively derive from their failure to properly identify disputed questions of material fact so as to defeat summary judgment at the trial court level, and procedurally derive from their failure to appreciate and comply with basic appellate procedure. For the foregoing reasons, this court is requested to deny petitioners' Petition for Writ of Certiorari.

DATED this 19th day of January, 1990.

Respectfully submitted,

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